IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6630 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

TRIKAMLAL L PATEL

Versus

STATE OF GUJARAT

Appearance:

MR DC Raval for MR ANAND for Petitioner

M/S PATEL ADVOCATES for Respondent No. 1

Mr. RV Desai for Respondent No. 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 04/08/2000

ORAL JUDGEMENT

Learned advocate Mr. Raval has appeared for the petitioner. Learned AGP Mr. R.V.Desai has appeared for the respondents. On 3rd April, 1991, this petition was admitted by this court and the interim relief was refused. While admitting this petition, the petition was ordered to be heard expeditiously.

2. In this petition, in para 14(B) of the petition, the petitioner has prayed for the relief as under:

> "To pay the petitioner back the amount of subsistence allowance recovered from him with 18% interest. "

In para 14(C) of the petition, the prayer made by the petitioner reads as under:

> "To consider the petitioner's case for promotion to the higher posts in the cadre of Head Clerk and in the cadre of Office Superintendent from the date on which his immediate junior after Sr.No.394 in the seniority list of Sr. Clerks as on1.1.1980 was considered and promoted to the higher posts."

The prayer made by the petitioner in para 14(D) and (E) of the petition read as under:

> "To promote the petitioner to the higher posts in the cadre of head clerk and then in the cadre of office superintendent on the basis of the date of promotion of his immediate junior to the said posts."

Thus, the main relief sought by the petitioner in this petition is in respect of his non-promotion to the higher post. The facts leading to the filing of this petition are as under:

The petitioner was appointed as Junior Clerk in the year 1959. In the year 1972, he was promoted to the post of Sr. Clerk in due course. In the year 1980-81,

he was due for promotion to the higher post but was not promoted and since then, literally hundreds of his juniors have been promoted to the higher post. According to the petitioner, he was not promoted on various so called grounds namely because of pendency of the departmental inquiry against the petitioner. As a result of some of the departmental inquiry, the respondent authority has imposed punishment against the petitioner. The petitioner was also suspended during the pendency of the departmental inquiry and after the period of 27 months' suspension, he was reinstated even during the pendency of the departmental inquiry. As regards the question of non-promotion, the petitioner had approached the Gujarat Civil Service Tribunal by filing appeal no. 487 of 1986. The tribunal has considered the question of non promotion of the petitioner in detail. Before the tribunal, it was pointed out by the petitioner that he was holding the post of auditor in the pay scale of Rs.330-560 in the office of the Joint Registrar of Cooperative Societies and his seniority as on 1st January, 1980 in the said cadre was at Sr.No. 394 and it is his grievance that the junior to him namely respondent NO. 2 and 3 of the said appeal who were at sr.no.433 and 789 were promoted to the higher post by order dated 25th March, 1981 and 24th May 1985 respectively and, therefore, both the orders were challenged by the petitioner in appeal before the tribunal. The tribunal, after taking into consideration the evidence brought before it, observed that the question for consideration before it was as to whether the non promotion of the appellant is arbitrary, bad in law or invalid and for that, the tribunal considered three aspects on this subject, namely whether the non promotion of the appellant was actuated by mala fide or not and whether it is arbitrary and whether it is violative of the relevant recruitment rules or principles thereunder governing the promotion of the appellant. The tribunal observed that no mala fides have been alleged or established in this case. The tribunal was of the view that the non promotion of the appellant should be viewed in the context of the relevant recruitment rules which provides for certain minimum experience in the lower grade and passing of G.D.C. and A. Examination and possessing the quality of proved merit and efficiency. The tribunal observed that as regards first two qualifications, there is no dispute between the parties. As regards the point of proved merit and efficiency, the tribunal examined the work and conduct of the appellant from 1972 when he was last promoted to the post of senior clerk. The tribunal noted that there is nothing on record to show that the adverse remarks against the appellant - petitioner herein

since 1972 onwards have not been communicated to the petitioner. The tribunal perused the annual confidential reports of the petitioner from 1972 to 1987 and found that even official communication recording adverse remarks have been endorsed to the petitioner and the tribunal believed that those adverse remarks were communicated to the petitioner on the basis of the presumption under section 114 of the Evidence Act. The tribunal observed that such presumption was corroborated by the fact that the petitioner had knowledge about his non promotion as a result of the decision of the first meeting of the selection committee after he become eligible for consideration for promotion and he has not challenged his non promotion when persons junior to him were promoted after the select list was finalized. In view of such observations, the tribunal was of the view that the non promotion of the petitioner was neither arbitrary nor against the relevant rules and as such, the tribunal rejected the appeal of the petitioner herein. Therefore, in view of the decision of the tribunal and also considering the facts of the present petition, I am of the opinion that the petitioner is not entitled to the relief in so far as the non promotion of the petitioner is concerned. Therefore, the prayer in respect of non promotion and to grant promotion to the petitioner to the next higher post is required to be rejected as there is no merit in such prayer.

So far as the prayer of the petitioner to pay the petitioner back the amount of subsistence allowance is concerned, in para 8 of the petition, the petitioner has made averment that the subsistence allowance is protected by his fundamental right to life under Art.21 of the Constitution. The petitioner has alleged that the suspension was on a very minor charge and was illegal and unconstitutional in the first place. The petitioner has also alleged that the order of recovery of subsistence allowance paid to the petitioner during 27 months' period from February, 1977 to April, 1979 is absolutely illegal, unconstitutional and bad in law. It is further alleged that the suspension can be ordered only if the evidence shows that the officer is involved in a grave misconduct which is likely to result in his dismissal, removal or compulsory retirement as per rule 152 and 156 of the Bombay Civil Service Rules. According to the petitioner, such is not a situation in the present case and, therefore, recovery of subsistence allowance is violative of the provisions of the Bombay Civil Service Rules as also Art. 21 of the Constitution of India.

By order dated 25th April, 1979, the petitioner was reinstated in service by the authority and he was suspended with effect from 18.2.1977. Such reinstatement was after the completion of the departmental inquiry against him. Thereafter, by order dated 14th December, 1979, punishment was imposed by the competent authority wherein unauthorized absence and the period of suspension was ordered to be treated as leave without pay. Said order dated 14th December, 1979 was challenged by the petitioner before the Gujarat State Civil Service Tribunal in appeal and, therefore, said order of punishment was not implemented by the authorities of the respondent but after the said appeal was rejected by the tribunal on 24th August, 1981, the authority has passed an order to recover the subsistence allowance for the period as aforesaid by way of instalment from the petitioner's salary of Rs.200/- p.m. The amount of subsistence allowance for the aforesaid period is Rs.11255.82 ps. which has been recovered by monthly instalment of Rs.200/- from the petitioner's salary. Against the said action of recovery of subsistence allowance, legal notice dated 12th August, 1985 was served to the respondents and the respondents replied the same on 17th August, 1987 that the recovery of subsistence allowance is legal and valid and, therefore, there was no need to re-examine the question and the request of the petitioner was turned down against recovery of the amount in question.

Therefore, in view of the aforesaid facts, this court is required to examine as to whether the respondent authorities are justified in recovering the amount of subsistence allowance which has been paid to the petitioner during the pendency of the departmental inquiry. It is required to be noted that in the order of punishment dated 14th December, 1979, no such recovery has been directed by the disciplinary authority against the petitioner that the subsistence allowance paid to the petitioner during the period of suspension should be recovered but it was directed that the period of suspension should be treated as leave without pay. Rule 152 of the Bombay Civil Service Rules provides as under:

"152 (1) When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to for the reinstatement shall consider and make a specific order for.-

(a) Regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) where the authority mentioned in sub rule (1) is of opinion that the government servant has been fully exonerated or in the case of suspension that it was wholly unjustified, the Government servant shall be given the full pay and allowances to which he would have been entitled had he not been dismissed, removed or suspended, as the case may be.

(3) In other case, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe;

Provided that the payment of allowances under clause (2) or (3) shall be subject to all other conditions under which such allowances are admissible.

(4) In a case falling under clause (2), the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) IN case falling under clause (3), the period of absence from duty shall not be treated as a period spent on duty unless such competent authority specifically directs that it shall be so treated for any specified purpose. "

Note below these rules is relevant. As per Note-2, under this rule, the authority competent to order the reinstatement can convert a period of absence from duty from the date of suspension, dismissal or removal, as the case may be, till the date of reinstatement into one of leave adverted into leave without pay, except in accordance with the conditions of rule 752. Subsistence allowance paid under this rule should be adjusted or recovered from the government servant when the period of suspension is converted into leave with or without pay. The conversion of only a part of the period of suspension as leave is not permissible, if a competent authority decides to convert a period spent under suspension into

one of leave, the entire period of suspension has to be converted into leave admissible under the rule. As per Rule 752 (a), extraordinary leave may be granted in special circumstances (1) when no other leave is by rule admissible or (2) when, other leave being admissible, the Government servant concerned applies in writing for the grant of extraordinary leave; such leave is not debited against the leave account. No leave salary is admissible during such leave. As per Rule 752 (b) of the BCSRs, the authority which has the power to sanction leave may grant extraordinary leave as in clause (a) in combination with, or in continuation of any leave that is admissible, and may commute retrospectively periods of absence without leave into extraordinary leave.

Rule 156 of the BCSRs provides that in case of suspension, an adjustment of his allowances for such periods should thereafter be made according to the circumstances of the case the full amount being given only in the event of the officer being acquitted of blame or if the proceedings taken against him were for his arrest for debt of its being proved that the liability arose from circumstances beyond his control or the detention being held by the competent authority to be unjustified. Rule 157 of the BCSRs provides that the amount of subsistence grant, if any, already drawn is to be deducted from the pay and allowances or proportion of them which may be granted under rule 152. Rule 159 of the BCSRs provides that the grant of pay and allowances or a proportion of them under rule 152 or note-4 below it does not cancel any acting arrangements that may have been in force during the period of a Government servant's suspension, removal, dismissal or reduction.

I have considered the above provisions of the Bombay Civil Service Rules. I have also perused the order of punishment dated 14th December, 1979 wherein it was not directed by the disciplinary authority that the subsistence allowance which was paid to the petitioner shall be recovered. There is no such direction issued by the disciplinary authority in the order of punishment. However, contrary to the order of punishment, the authority has passed order on 25th February, 1982 to recover the the suspension allowances which was paid to the petitioner during the pendency of the departmental inquiry under rule 151 of the Bombay Civil Service Rules. Said order dated 25th February, 1982 was passed under rule 152 of the Bombay Civil Service Rules. In Rule 152, no such power has been given to the authority to recover the entire amount of subsistence allowance which was paid to the employee during the period of suspension. When

the suspension period has been treated as leave without pay, the question of adjustment of suspension allowance does not arise because the competent authority has not granted extraordinary leave with pay to the petitioner. Under the rules, only adjustment of the suspension allowance has been permissible but no recovery of the amount of suspension allowance has been permitted under the Rules. Even considering rule 152 itself, there is no provision to recover the entire amount of suspension allowance in case when the period of suspension was treated as leave without pay. Note-2 of the said rules has provided that the period of such absence including the suspension period cannot, however, be converted into leave without pay except in accordance with condition under rule 752. Considering rule 752 of the Rules, no such contingency has been provided to recover the entire amount of suspension allowance from the salary of the employee. Said note-2 further provides that the suspension allowance under this rule shall be adjusted or recovered from the government servant when the period of suspension is converted into leave with or without pay but this is subject to rule 752 but in the present case, that condition mentioned under rule 752 is not fulfilled and, therefore, recovery of the total amount of suspension allowance is prima facie illegal and the authorities are not justified in recovering the said amount from the petitioner. The subsistence allowance has been paid to the employee during the pendency of the departmental inquiry or during the period of suspension to maintain the family and if such amount of suspension allowance is recovered under the guise of treating it as leave without pay, then, it is nothing but in reality, denial of suspension allowance to the employee during the period of suspension. Such denial is violative of Article 21 of the Constitution and it amounts to breach of the fundamental right under the Constitution of India. Such question has been examined by the apex court in case of M. Paul Antony versus Bharat Gold Mines Ltd. and Anr., the apex court has observed as under in para 28 to 31 :

> "28. Service rules also usually provide for payment of salary at a reduced rate during the period of suspension (See Fundamental Rule 53). This constitutes the 'subsistence allowance;. If there is no provision in the rules applicable to a particular class of service for payment of salary at a reduced rate, the employer would be liable to pay full salary even during the period of suspension.

29. Exercise of right to suspend an employee may be justified on the facts of a particular case. Instances, however, are not rare, where officers have been found to be afflicted by "suspension syndrome" and the employees have been found to be placed under suspension just for nothing. It is their irritability rather than the employees' trivial lapse which has often resulted in suspension. Suspension notwithstanding,non payment of subsistence allowance is an inhuman act which has an unpropitious effect on the lift of an employee. When the employee is placed under suspension, he is demobilised and the salary is also paid to him at a reduced rate under the nick name of 'subsistence allowance, so that the employee may sustain himself. This Court in O.P. Gupta v. Unionof India (1987) 4 SCC 328:(AIR 1987 SC 2257)made the following observations with regard to subsistence allowance (para 15 of AIR).

'An order of a suspension of a Government servant does not put an end to his serviceunder the Government. He continues to be a member of the service inspite of the order of suspension. The real effect of suspension as explained by the Court in Khem Chand v. Unionof India (AIR 1958 SC 300) is that he continues to be a member of the Government service but is not permitted to work and further during the period of suspension, he is paid only some allowance-generally called subsistence allowance- which is normally less than the salary instead of the pay and allowances which he would have been entitled to if he had not been suspended. There is no doubt that an order of suspension, unless the departmental inquiry is conducted within a reasonable time, affects a Government servant injuriously. The very expression 'subsistence allowance' has an undeniable penal significance. The dictionary meaning of the word 'subsist' as given in Shorter Oxford English Dictionary Vol.II at p.2171 is "to remain alive as on food, to continue in to exist."subsist" means -means of supporting life,especially a minimum livelihood."

30. If, therefore, even that amount is not paid, then, the very object of paying the reduced salary to the employee during the period of suspension would be frustrated. The act of nonpayment of Subsistence Allowance can be likened to slow poisoning as the employee, if not permitted to sustain himself on account of non payment of Subsistence Allowance would gradually starve himself to death.

31. On joining Government service, a person does not mortgage or barter away his basic rights as a human being, including his fundamental rights, in favour of the Govt. The Govt. only because it has the power to appoint does not become the master of the body and soul of the employee. The Govt. by providing job opportunities to its citizens only fulfils its obligations under the Constitution including the DIrective Principles of the State Policy. The employee, on taking up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with the Government or any other employer, like instrumentalities of the Govt. or Statutory or Autonomous Corporations etc., is regulated by the terms of contract of service, or Service Rules made by the Central or the State Govt. under the Proviso to Article 309 of the Constitution or other Statutory Rules including Certified Standing Orders. The Fundamentanl Rights, including the Right to Life under Article 21 of the Constitution or the basic human rights are not surrendered by the employee. The provision for payment of subsistence allowance made in the Service Rules only ensures non violation of the right to life of the employee. That was the reason why this Court in State of v. Chanderbhan, (1983) 3 SCR 337 : 3 SCC 387 : AIR 1983 SC 803 struck down a Service Rule which provided for payment of a nominal amount of Rupee one as Subsistence Allowance to an employee placed under suspension. This decision was followed in Fakirbhai Palabhai Solanki v. Presiding Officer, (1986) 3 SCC 131:(1986) 2 SCR 1059:AIR 1986 SC 1168 and it was held in that case that if an employees could not attend the departmental proceedings on account of financial stringencies caused by nonpayment of subsistence allowance, and thereby could not undertake a

journey away from his home to attend the departmental proceedings, the order of punishment, including the whole proceedings would stand vitiated. For this purpose, reliance was also placed on an earlier decision in Ghanshyam Dass Shrivastava v. State of Madhya Pradesh (1973) 1 SCC 656 : AIR 1973 SC 1183."

In view of the aforesaid decision of the apex court, suspension allowance is a matter of right of an employee who has been placed under suspension during the pendency of the departmental inquiry. Such an allowance is given to the employee just to maintain his family during the pendency of the departmental proceedings. In the instant case, the disciplinary authority has, vide order dated 14th December, 1979, ordered to treat the period of suspension as leave without pay in which no recovery has been directed tobe made from the petitioner's salary of the amount which has been paid to the petitioner towards suspension allowance. However, thereafter, on 25th February, 1982, the authority has passed order of recovery of suspension allowance which was paid to the petitioner during the period from 22nd February, 1977 to 21st May, 1979 under rule 152 of the Bombay Civil Service Rules. According to my opinion, since the suspension period has been treated as leave without pay, therefore, the petitioner was not entitled to any amount of leave salary during this period and therefore question of adjustment of suspension allowance does not arise and, therefore, there was no any question of recovery of suspension allowance from the salary of the petitioner. Therefore, the authorities are not justified in recovering the amount which was paid to the petitioner as subsistence allowance during the period when the petitioner was under suspension.It amounts to non granting of suspension allowance to the petitioner who was placed under suspension during the pendency of the departmental inquiry which is not permissible under rule 152 read with rule 752, Note - 2 of the Bombay Civil Service Rules. Therefore, considering all the facts and circumstances of the case and also taking into consideration the provisions of rule 152 read with rule 752 of the BCSRs, as per my view, such recovery is arbitrary, illegal and without jurisdiction and, therefore, the order dated 25th February, 1982 annexure "C" is required to be quashed and set aside and the respondents are required to refund the said amount to the petitioner.

Now, since the recovery impugned herein has been held to be arbitrary, illegal and without jurisdiction,

the question arise is as to whether the petitioner is entitled to any interest on the said amount or not. Learned advocate Mr. Raval for the petitioner has submitted that an amount of suspension has already been recovered from the petitioner by the respondent authorities and the petitioner has already retired from service on 31st October, 1996. He has submitted that since the said amount has illegally been recovered from the salary of the petitioner and it has been retained and utilized by the respondent authorities, same should be ordered to be returned to the petitioner with some interest. He has submitted that the petitioner has been deprived of the said amount for a period of about 17 years and the respondents have utilized the same for such a long period and, therefore, to compensate the loss which the petitioner has suffered, some interest should be ordered to be paid. Learned AGP Mr. Desai appearing for the respondents has submitted that the respondents have rightly recovered the amount which was paid to the petitioner as subsistence allowance. He has further submitted that the challenge to the order of punishment dated 14.12.1979 has failed and the appeal of the petitioner against the said order was rejected by the tribunal vide judgment dated 24.8.1981 and, therefore, he has submitted that the petitioner is not entitled to get back the said amount much and, therefore, the petitioner is also not entitled to interest.

Considering the submissions of both the learned advocates for the parties, I am of the view that the petitioner is entitled to interest on the said amount because the recovery of the said amount from the petitioner's salary is arbitrary, unjust, unfair and violative of the fundamental right. It is more so when the said amount has been utilized by the authorities for a period of about 17 years and the petitioner has been deprived of the said amount for such a long period. Therefore, I am of the opinion that the petitioner is entitled to interest on the said amount at the rate of 12% per annum from the date of the petition till the realization i.e. from 29th August, 1988 till realization.

In the result, this petition is partly allowed. The prayer made in para 14(B) of the petition is granted and the order dated 25th February, 1982 is hereby quashed and set aside. The respondents are directed to pay to the petitioner an amount of suspension allowance of Rs.11,255.82 ps. which was recovered from the petitioner by order dated 25th February, 1982. The respondents are directed to pay the said amount of Rs.11,255.82 ps.

(Rs.eleven thousand two hundred fifty five and paisa eighty two only) to the petitioner with running interest thereon at the rate of 12% per annum from the date of the petition i.e. 29th August, 1988 till realization. Rest of the prayers made in this petition are rejected. Rule is made absolute in terms indicated hereinabove with no order as to costs.

4.8.2000. (H.K. Rathod,J.)

Vyas